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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 545

LAURIE J. CARPENTER,

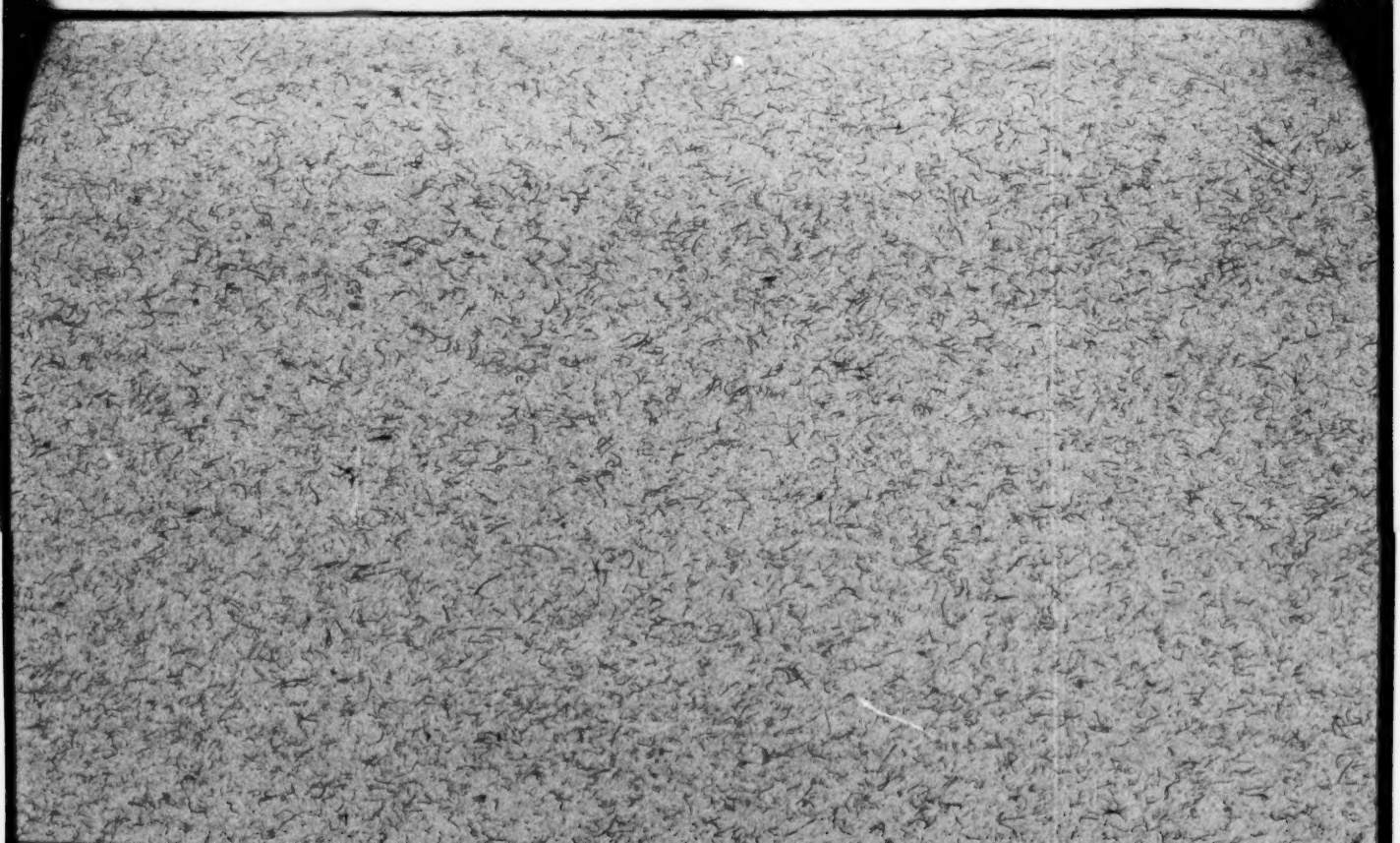
Petitioner

vs.

ERIE RAILROAD COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

LAURIE J. CARPENTER,
Plaintiff in Person,
458 W. 35th St.,
New York 1, N. Y.



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ERIE RAILROAD CO.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF OF PLAINTIFF IN PERSON.

Petition for Certiorari

To the Honorables, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioner, Laurie J. Carpenter, respectfully submits his petition for a writ of certiorari to review the decree of the United States Court of Appeals for the Second Circuit in the above entitled case.

The Court of Appeals for the Second Circuit has affirmed an order, dismissing the complaint in the District Court

of the United States for the Southern District of New York.

The jurisdiction of the Court is invoked for a Court of Appeals rendering a decision probably in conflict with the applicable decisions of this Court and rendering a decision holding a Federal Statute inapplicable.

The question presented is U. S. Statutes, Volume 60, part 1, Chapter 540, Section 43 and Section 46 applicable and are all actions *res judicata*?

The reason relied on is the opinion in *Toledo Scale Co.* v. *Computing Scale,* 261 U. S. 399, page 412, "only a final decree is res judicata" and *N. Y. C. & H. R.* v. *Kinney,* 260 U. S. 340, that an action may proceed without pleading the law and "if a defendant had notice from beginning that the plaintiff sets up and is trying to enforce a claim against it because of a specified conduct, a liberal rule should be applied."

The Court of Appeals made a finding of fact that it was an accident, where the pleading had established that there was negligence.

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SUPREME COURT OF THE UNITED STATES

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ERIE RAILROAD CO.

BRIEF IN SUPPORT OF PETITION

Jurisdiction of the Court

The jurisdiction of the Court is invoked for a Court of Appeals rendering a decision probably in conflict with the applicable decisions of this Court and rendering a decision holding a Federal Statute inapplicable.

Argument

SUMMARY

The new Federal Right in Title 15, Section 1125a, is not a Trade Mark Law as the decision holds. The Chapter 540 in Statutes 60, part 1, Sec. 46 • • • "All acts and parts of acts inconsistent herewith are hereby repealed." • • •

There is evidence of misrepresented service of medical care required. This would be an extrinsic fraud to prevent a right in Court. It is a misrepresented service applying to Title 15, Section 1125a.

Title 15 is Commerce and Trade law. The Section 1125a is printed in the record Page 12a.

(A similar statute in Trade Mark law is Title 15, Sec. 1114.)

The name of a locality in Title 15, Sec. 1125a can not be appropriated as a Trade Mark. *California Apparel Creators* v. *Weider of California*, 162 Fed. 2d 893, C. C. A. 2nd, 1947.

Actions *in personam* are not *res judicata*, actions *in rem* are. *Kline* v. *Burk Construction Co.*, 260 U. S. 226.

Where proceedings for setting aside or modifying judgment have been commenced during term, Court's control does not cease at expiration of term, *Hiawassee Lumber Co.* v. *U. S.*, 64 F. 2d 417.

The Federal Employer's Liability Act is not a right created by statute, where there was no contributory negligence. The right existed in the state laws. If the right was not created by statute the right did not expire with its limitation. If the right existed before the limitation statute, it can be extended.

A separate action is allowed for extrinsic fraud. *Wallace* v. *U. S.*, 142 F. 2d 240-244.

Argument

Those unsuccessful actions on a ruling of limitations should have all succeeded, if the cause of action had accrued.

The first one in N. J. State Court was within the time alloted. The defendant moved for a non suit. The Court did not direct which Court to proceed in, but there had been no proceeding in equity to enjoin issues.

The action in the Southern District in 1934 was dismissed under rule 106 of the Civil Practice Act of N. Y., that the complaint did not state facts sufficient to constitute a cause of action. Opinion of Judge Caffey record page 14a. The other ground that the cause of action did not accrue within the time limited under rule 107 C. P. A. implies that there was a cause of action and is impeached by the ruling that the complaint did not constitute facts sufficient to constitute a cause of action.

It would be error to dismiss on the merits, when the complaint did not constitute facts sufficient to constitute a cause of action. *McCammon* v. *Kaiser,* 112 N. E. 572, 218 N. Y. 46.

The action in United States District Court in New Jersey involves a review of the non suit in New Jersey State Court. As the state court had already made a review and ruled that there was no new evidence in fact or in law, there was nothing to be added. It is disputed that the District Court said they had no jurisdiction. The decision holds the appeal of that, *Carpenter* v. *Erie,* 132 F. 2d 362, to be an adverse finding of limitations.

If according to the appeal above, it is incumbent on a party suing under the act to allege and prove that an action is within the time limited, the action was so within the time as counting from the State Court action.

The decision holds the second action in the Southern District to be *res judicata* finding of limitations, by reason of the Appeal, *Carpenter* v. *Erie,* 170 F. 2d 73, 336 U. S. 904. That action had new medical evidence.

There has been some effort to make prior actions part of the succeeding ones as ancillary proceedings.

The theory is explained in *N. Y. C. & H. R.* v. *Kinney,* 260 U. S. 340, page 346. "• • • but when a defendant has had notice from the beginning that the plaintiff sets up and is trying to enforce a claim against it because of a specified

conduct, the reasons for the statute do not exist and we are of the opinion that a liberal rule should be applied." The opinion is repeated in *Tiller* v. *Atlantic Coast Line*, 323 U. S. 574, page 581, in *U. S.* v. *Memphis Cotton Oil Co.*, 288 U. S. 62, page 69. In *Damiano* v. *P. R. R. Co.*, 161 F. 2d 534, a claim for state compensation was not a specified conduct of negligence.

A cause of action does not accrue on the date of the injury, *Dusek* v. *Penn R. Co.*, 68 F. 2d 131.

The decision calling the case an accident may not be substantive, being only a use of the language, that an accident is an unexpected event. An action for negligence with Court and Jury is retained in the New Jersey Workmen's Compensation Law. 34:15.

Information of another Medical text book is discovered since taking the last appeal.

A new analogy from the exhibit of the restoration of the salient angle after fracture of the Os Calcis, that there has been an inverted fracture of the os calcis is substantive. In medical literature the ligaments will break a phalanx or will break a knee cap. It should be added to Dr. Lippert's report. Conclusion: Chronic ligamentous tearing * * * (Report record page 10a)

In the report History should be changed. He presumes that X rays were taken and the foot strapped. There were no original X rays, but it suggests that there should have been.

The History that Duke Hospital advised wearing a brace should be that they said they were willing to make a brace, but did not advise it.

It is not established that prior X rays showed any damage. Those made by the defendant in 1932 were sent to a laboratory for interpretation with a finding of no damage.

It was only a slight reduction in clearance for cartilage padding between the tibia and astragalus bones.

The indications are that the position for X ray pictures used was not a specialized supervision.

If the practice had been known at the making of the last X ray pictures that in dislocation without displacement no weight is borne until after 8 weeks, it would have been tested then. It would have been tested at any time before without such information, if it had been permitted.

Respectfully submitted,

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(6170)